Choo Mooi Kooi @ Choo Soo Yin v Choo Choon Jin @ Jimmy Choo and other suits

HIGH COURT (PULAU PINANG) — CIVIL SUIT NOS 22–619 OF 2005, 22–342 OF 2006, 22–348 OF 2006 AND 22–653 OF 2005
VARGHESE GEORGE JC
26 JULY 2011

Succession — Will — Validity — Deceased's nephew applied for and obtained grant of probate — Plaintiffs challenged validity of will — Testamentary capacity — Whether deceased had testamentary capacity to execute will — Whether deceased lacked testamentary capacity to execute memorandum of transfer ('MOT') — Whether there were suspicious circumstances surrounding making of will and MOT — Whether defendant discharged burden of proving testamentary capacity and due execution of will and MOT — Whether grant of probate issued based on will ought to be revoked — Whether defendant should be ordered to pay damages to estate for all losses caused with interest

When Choo Peng Hoi @ Choo Peng Jen ('the deceased') died on 5 February 2005, the deceased's nephew ('the defendant') applied for and obtained a grant of probate to the estate of the deceased based on the last will purportedly made by the deceased on 2 August 2004 ('the will'). The will named the defendant as the executor and sole beneficiary of all the estate of the deceased, which at the time of his death consisted of a one-half undivided share in a piece of land in Kedah ('the land') and some shares in public listed companies. On 2 August 2004, the deceased had also executed a memorandum of transfer ('MOT') gifting the land to the defendant for the consideration of 'love and affection'. On 2 August 2005, the defendant had obtained a grant of probate to the estate of the deceased based on the will. On 5 April 2005, the defendant had registered the land in his favour. The brother and sister of the deceased ('the plaintiffs') filed two separate suits against the defendant challenging the validity of the will and the MOT. The present judgment was in respect of these consolidated suits. The plaintiffs' case was that as at 2 August 2004, the deceased did not possess the necessary testamentary capacity to make the will and to execute the MOT; that the alleged making of the will was surrounded by suspicious circumstances; and that the deceased was coerced or unduly influenced by the defendant to execute the MOT. Accordingly the plaintiffs prayed, inter alia, for the will to be declared invalid, for the grant of probate granted to be revoked and the MOT to be declared a void or insufficient instrument. It was thus the plaintiffs' position that the deceased had died intestate and consequently all assets belonging to the deceased at the time of his death should devolve to the plaintiffs as the only surviving siblings of the deceased. In response the defendant submitted that the deceased had satisfied

all the testamentary-capacity requirements to make the will on 2 August 2004 and that the will was dully made before a solicitor. The defendant further submitted that the transfer of the land by way of the MOT had been registered and that the defendant held an indefeasible title over the land.

Held, allowing the plaintiffs' claim with costs:

(1) The burden of proving testamentary capacity and due execution of the will was on the defendant. The defence chose to rely purely on the evidence of the solicitor who prepared the deceased's will and witnessed its execution by the deceased. However, this solicitor displayed selective memory and was evasive on crucial questions put to him. It also appeared that the taking of instructions and execution of the will by the deceased was hurriedly done, since certain corrections to the will were merely done by deletion and a type-over rather than a fresh copy being produced. Thus, the defendant had failed to discharge the burden on him to establish that the deceased possessed full testamentary capacity to make the will or execute the MOT on 2 August 2004. The court was more persuaded by the medical reports and testimony of the three medical consultants who attended to the deceased on or about 9 August 2004 to 11 August 2004 to arrive at the finding of fact that the medical condition of the deceased detected some one week later was of an illness of such severity and of a chronic nature that in all probability it had impaired the deceased's mental faculty even on 2 August 2004. The defence failed to call any evidence to dispute the seriousness of the deceased's affliction as stated in the medical reports (see paras 19–24).

(2) The suspicious circumstances surrounding the due execution of the deceased's will and the MOT, which were inference of facts drawn from evidence adduced before this court, were not dispelled by the defendant on whom lay the burden to do so. These circumstances included, inter alia, the necessity for making both a will and the MOT in respect of the land; the execution of the will and MOT by the deceased merely affixing his thumbprint to the two documents rather than by way of a signature when he was able to sign in English; the solicitor's evidence that the defendant had paid the legal fees for the preparation of the will and execution of MOT which was later denied by the defendant (see paras 25–27 & 29).

(3) Further the defendant had failed to displace the plaintiff's case that the defendant had exerted 'undue influence' or 'dominion' over the will and mind of the deceased by any credible independent evidence (see para 28).

(4) The basic issue before this court was whether the deceased had the necessary testamentary capacity to make the will and execute the MOT. As such, it did not matter that the cause of testamentary incapacity or the affliction suffered by the deceased at the time of the making of the will

and MOT was pleaded to be cancer. The plaintiffs had succeeded in their case against the defendant to invalidate both the will and the MOT. Thus, it was declared that the deceased died intestate, that the grant of probate issued on 2 August 2005 be revoked and that the defendant renders full accounts of acts conducted by him pursuant to the grant of probate. The transfer of the land in favour of the defendant was declared invalid and the defendant ordered to pay damages to the estate for all losses caused by the wrongful transfer of the land to himself. The defendant was also ordered to pay damages to the estate for all losses caused to the estate with interest (see paras 29–30).

[Bahasa Malaysia summary

Apabila Choo Peng Hoi @ Choo Peng Jen ('si mati') meninggal dunia pada 5 Februari 2005, si mati ('defendan') memohon dan memperolehi geran probet bagi harta pusaka si mati berdasarkan kepada wasiat terakhir yang dikatakan dibuat oleh si mati pada 2 Ogos 2004 ('surat wasiat tersebut'). Surat wasiat tersebut menamakan defendan sebagai wasi dan satu-satunya benefisiari kesemua harta pusaka si mati, yang pada masa dia meninggal dunia termasuk separuh bahagian tidak dibahagi sebidang tanah di Kedah ('tanah tersebut') dan beberapa saham di syarikat-syarikat yang disenarai awam. Pada 2 Ogos 2004, si mati juga telah memeterai satu memorandum pindah milik ('MOT') menghadiahkan tanah tersebut kepada defendan sebagai balasan kasih sayang. Pada 2 Ogos 2005, defendan telah memperolehi geran probet harta pusaka si mati berdasarkan kepada wasiat tersebut. Pada 5 April 2005, defendan mendaftarkan tanah tersebut memihak kepadanya. Adik-beradik lelaki dan perempuan si mati ('plaintif-plaintif') memfailkan dua guaman berasingan terhadap defendan mencabar kesahan wasiat dan MOT tersebut. Penghakiman ini adalah berkaitan dengan guaman yang digabungkan ini. Kes plaintif-plaintif adalah bahawa setakat 2 Ogos 2004, si mati tidak mempunyai apa-apa keupayaan perwasiatan untuk membuat wasiat dan untuk menandatangani MOT tersebut; bahawa pembuatan wasiat yang didakwa diselubungi oleh hal keadaan yang meragukan; dan bahawa si mati dipaksa atau dipengaruhi secara tidak wajar oleh defendan untuk menandatangani MOT. Dengan itu plaintif-plaintif memohon, antara lain, untuk wasiat tersebut diisytiharkan tidak sah, untuk geran probet yang diberikan dibatalkan dan MOT diisytiharkan batal atau suratcara yang tidak memadai. Dengan itu adalah hujahan plaintif-plaintif bahawa si mati telah mati tanpa wasiat dan dengan itu kesemua aset kepunyaan si mati pada masa dia meninggal dunia sepatutnya diturunkan kepada adik-beradik si mati yang masih hidup. sebagai balasan, defendan menghujahkan bahawa si mati telah memenuhi kesemua keperluan keupayaan pewasiatan untuk membuat wasiat tersebut pada 2 Ogos 2004 dan bahawa wasiat tersebut dibuat di hadapan seorang peguamcara. Defendan selanjutnya menghujahkan bahawa pindah milik tanah tersebut

melalui MOT telah didaftarkan dan defendan memegang hak milik tidak boleh sangkal ke atas tanah tersebut. A

Diputuskan, membenarkan tuntutan plaintif-plaintif dengan kos:

(1) Beban membuktikan keupayaan pewasiatan dan penandatanganan wasiat adalah pada defendan. Pihak pembelaan memilih untuk bersandar semata-mata atas keterangan peguamcara yang menyediakan wasiat si mati dan menyaksikan penandatanganannya oleh si mati. Walau bagaimanapun, peguamcara ini menunjukkan daya ingatan memilih (*selective memory*) dan mengelak soalan-soalan penting yang ditanya kepadanya. Juga kelihatan bahawa pengambilan arahan dan penandatanganan wasiat oleh si mati dibuat secara tergesa-gesa, oleh sebab pembetulan tertentu kepada wasiat tersebut dibuat hanya dengan memadamkannya dan ditulis diatasnya dan bukan salinan baru dikemukakan. Oleh demikian, defendan telah gagal melepaskan beban ke atasnya untuk membuktikan bahawa si mati mempunyai keupayaan penuh pewasiatan untuk membuat wasiat tersebut atau menandatangani MOT pada 2 Ogos 2004. Mahkamah lebih yakin dengan laporan perubatan dan keterangan tiga perunding perubatan yang merawat si mati pada atau sekitar 9 Ogos 2004 hingga 11 Ogos 2004 untuk membuat penemuan fakta bahawa keadaan kesihatan si mati dikesan lebih kurang seminggu kemudian didapati mengalami penyakit yang teruk dan bersifat kronik yang berkemungkinan besar mencacatkan daya pemikiran si mati walaupun pada 2 Ogos 2004. Pihak pembelaan gagal untuk mengemukakan apa-apa keterangan untuk mempertikaikan keseriusan penderitaan si mati seperti yang dinyatakan di dalam laporan perubatan tersebut (lihat perenggan 19–24). B C D E F

(2) Hal keadaan yang meragukan yang menyelubungi penandatanganan wasiat si mati dan MOT, yang merupakan anggapan fakta yang dibuat daripada keterangan yang dikemukakan di hadapan mahkamah ini, tidak dipatahkan oleh defendan yang di atasnya terletak beban untuk berbuat demikian. Hal keadaan ini termasuk, antara lain, keperluan untuk membuat kedua-dua wasiat dan MOT berkaitan dengan tanah tersebut; penandatanganan wasiat dan MOT oleh si mati dengan hanya meletakkan cap ibu jari atas kedua-dua dokumen dan bukan dengan menandatanganinya apabila dia boleh menandatangan dalam bahasa Inggeris; keterangan peguamcara bahawa defendan telah membayar fi guaman untuk penyiapan wasiat dan penandatanganan MOT yang kemudiannya dinafikan oleh defendan (lihat perenggan 25–27 & 29). G H I

(3) Selanjutnya defendan telah gagal untuk menyingkirkan kes plaintif-plaintif bahawa defendan telah menggunakan 'undue influence' atau 'dominion' ke atas keupayaan dan pemikiran si mati dengan apa-apa keterangan bebas yang boleh dipercayai (lihat perenggan 28).

(4) Isu asas di hadapan mahkamah adalah sama ada si mati mempunyai keupayaan pewasiatan yang diperlukan untuk membuat wasiat dan menandatangani MOT. Oleh demikian, tidak penting bahawa kausa ketidakupayaan perwasiatan dan penderitaan yang dialami oleh si mati pada masa membuat wasiat dan MOT diplidkan sebagai kanser. Plaintif-plaintif telah berjaya di dalam kes mereka terhadap defendan untuk menidaksahkan kedua-dua wasiat dan MOT. Maka, diisytiharkan bahawa si mati meninggal dunia tanpa wasiat, bahawa geran probet yang diberikan pada 2 Ogos 2005 dibatalkan dan bahawa defendan bertanggungjawab sepenuhnya atas tindakan yang diambilnya menurut geran probet tersebut. Pemindahmilikan tanah memihak kepada defendan diisytiharkan tidak sah dan defendan diperintahkan membayar ganti rugi kepada estet tersebut bagi semua kerugian yang disebabkan oleh pindah milik salah tanah tersebut kepada dirinya sendiri. Defendan juga diperintahkan membayar ganti rugi kepada estet bagi kesemua kerugian yang disebabkan kepada estet dengan faedah (lihat perenggan 29–30).]

Notes

For cases on validity of will, see 11 *Mallal's Digest* (4th Ed 2011 Reissue) paras 2789–2793.

Cases referred to

Chock Yook Kwai v Chock Yook Chong & Ors [2002] 8 CLJ 161, HC (folld)

Eu Boon Yeap & Ors v Ewee Kean Hoe [2008] 2 MLJ 869, CA (folld)

Gan Yook Chin (P) v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (folld)

Khaw Cheng Bok v Khaw Cheng Poon & Ors [1998] 3 MLJ 457, HC (folld)

Khaw Cheng Poon & Ors v Khaw Cheng Bok & Ors and another appeal [2005] 6 MLJ 540, CA (folld)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (folld)

Waring & Waring (1848) 13 ER 715 (refd)

Legislation referred to

National Land Code s 340(2)(b)
Rules of the High Court 1980 O 6, O 8, Form 14A
Wills Act 1959 s 15

John Khoo (Elson Beh with him) (Ismail, Khoo & Associates) for the plaintiffs in Case Nos 22–619 of 2005, 22–653 of 2005, 22–342 of 2006 and 22–348 of 2006.

Ganesh Ponniah (Geh Cheng Lok & Co) for the defendant.

Varghese George JC:

[1] After a full trial, I had on 12 July 2011 delivered my decision in this consolidated proceeding stating my broad reasons for the same. I had indicated then that I will issue the full grounds for my decision. I do so now.

[2] Choo Peng Hoi @ Choo Peng Jen ('the deceased') died a bachelor on 5 February 2005 at Penang Adventist Hospital. He was 63 years of age and the cause of death recorded on the death certificate was 'Gastric Carcinoma with Sepsis'.

BACKGROUND

[3] At the time of his death the deceased was the registered owner of a 1/2 undivided share in a piece of land known as Lot 763 (held under Grant Mukim No 15) in the Mukim of Padang Cina, Daerah Kulim, Negeri Kedah. He also held some shares in public listed companies.

[4] The plaintiff in Suit Nos 22–342 of 2006 and 22–348 of 2006 was the brother of the deceased.

The plaintiff in Suit Nos 22–619 of 2005 and 22–653 of 2006 was the sister of the deceased.

[5] The common defendant named in all the suits was a nephew of the deceased. The defendant is also the son of the plaintiff in Suit Nos 22–342 of 2006 and 22–348 of 2006.

[6] The defendant had on 2 August 2005 obtained from the High Court, Penang, a grant of probate to the estate of the deceased based on a last 'will' of the deceased purportedly made on 2 August 2004 ('will'). The will of the deceased, which was being sought to be impugned in this action, named the defendant as trustee and executor of the will and effectively made the defendant the sole beneficiary of all of the estate of the deceased including the ½ undivided share in Lot 763.

[7] The defendant had also on *5 April 2005* registered in the defendant's favour the 1/2 undivided share in Lot 763 by using a *Borang* 14A (memorandum of transfer under the National Land Code 1965) ('MOT') allegedly executed by the deceased as 'transferor' also on 2 August 2004, gifting the 1/2 undivided share in Lot 763 to the defendant for the declared consideration stated therein, of 'love and affection' ('sebagai balasan kasih sayang').

[8] Generally stated, the plaintiffs in this action contended that:

(a) the will allegedly made by the deceased; and

(b) the MOT allegedly executed by the deceased both on 2 August 2004,

had been so made or executed at a time when the deceased was not of sound mind and/or when deceased could not exercise his free will with full understanding as to the nature and implications of the will and/or the MOT.

[9] Following from the above it was the plaintiffs' position that the deceased had therefore died intestate and consequently all assets belonging to the deceased at the time of his death should devolve to both the plaintiffs as the only surviving natural siblings of the deceased.

THE PLAINTIFFS' CASE IN SUMMARY

[10] The plaintiffs' case was that in so far as the will was concerned, the deceased did not on 2 August 2004 posses the necessary testamentary capacity, specifically mental capacity, to make the will and/or that there was no due execution of the will and/or that the alleged making of the will was surrounded by suspicious circumstances. Accordingly the will ought to be held to be invalid and be struck down by the court and the grant of probate issued to the defendant should be recalled and revoked, it was contended.

[11] The plaintiffs in so far as the MOT was concerned, maintained that the MOT was a 'void or insufficient instrument' to effect the so called transfer for the same reason that the deceased lacked sufficient mental capacity to execute the same on 2 August 2004 and/or for the further reason that the deceased was coerced and/or unduly influenced by the defendant to execute the MOT, since at that material time the defendant had exercised dominion over the will of the deceased.

It was also pointed out that with the existence of the alleged will giving the defendant all of the deceased's assets there was, in the first place, no need for an MOT to be separately executed by the deceased. The defendant's actions in securing the MOT, it was argued, was clearly therefore in furtherance of the defendant's fraudulent and/or deceptive intent to lay his hands on the deceased's 1/2 undivided share in Lot 763, to the exclusion of the plaintiffs.

THE DEFENDANT'S CASE IN SUMMARY

[12] The defendant's response was that the deceased on 2 August 2004 satisfied all the testamentary-capacity requirements or tests to make the will and it was duly made before an advocate and solicitor who had read out the

contents of the will to the deceased. The grant of probate had also since been issued by the court to the defendant after it was duly proved.

[13] Similarly the transfer using the MOT had been registered and thereby the defendant held an indefeasible title over the 1/2 shares in Lot 763. The defendant also maintained that the plaintiffs' allegation of 'fraud' as a ground to set aside or defeat the indefeasibility of defendant's title over that interest, should be rejected outright because no particulars had been pleaded by the plaintiffs of any such acts of 'fraud' and nor was any proven at the trial to vitiate the transfer.

[14] It was also argued for the defendant that the medical condition of the deceased about early August 2004 on evidence, if at all relevant, was not 'cancer' as was pleaded by the plaintiffs to be the sole 'disability' affecting the mental capacity of the deceased to make the will or execute the MOT on 2 August 2004

LAW AND BURDEN OF PROOF

[15] The principles of law that have been recognised and applied where similar issues have arisen as here in this action, including on the issue of where the respective burden of proof lay, could be gleaned, particularly, from the following authorities:

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97 (CA)(approved by the Federal Court in *Gan Yook Chin (p) v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1); *Tho Yow Pew & Anor v Chua Kooi Hean* [2002] 4 MLJ 97 (CA); *Chock Yook Kwai v Chock Yook Chong & Ors* [2002] 8 CLJ 161; *Khaw Cheng Bok v Khaw Cheng Poon & Ors* [1998] 3 MLJ 457 (subsequently affirmed by Court of Appeal in *Khaw Cheng Poon & Ors v Khaw Cheng Bok & Ors and another appeal* [2005] 6 MLJ 540); *Eu Boon Yeap & Ors v Ewee Kean Hoe* [2008] 2 MLJ 869.

In a nutshell the guiding principles in this area of law that could be distilled from the said decisions (as also from various other cases considered in them) could be summarised as follows:

(a) where the validity of a will is challenged, the testamentary capacity of the testator must be first established;

(b) the burden of proving:

  (i) testamentary capacity, and

  (ii) due execution was on the propounder of the will, as was also the burden of

(iii) dispelling any suspicious circumstances that surrounded the making of the will.

(c) there must be evidence that the contents of the will had been read over to the deceased and the deceased understood the dispositions being made;

(d) the onus then shifted to the party challenging the validity of the will to establish to the satisfaction of the court on relevant and cogent evidence the existence of any vitiating circumstances;

(e) mere suspicions or conjectures are not ordinarily sufficient to dispense the validity of the signature or the contents of the will;

(f) the court will not concern itself with the fairness of the disposition in the will once satisfied that the testator understood the dispositions being made and the will in question was duly executed;

(g) whether the execution of the impugned will was a result of 'testamentary incapacity' (ie not of good health, sound mind, memory and understanding) was a specific finding of fact to be made on the totality of the evidence led before the court;

(h) the burden of the proof often shifts about in the process of the cause according to the successive steps of the inquiry, before leading to the decisive inferences to be made — (*Waring & Waring* (1848) 13 ER 715 at p 720 — applied with approval by Court of Appeal in *Lee Ing Ching @ Lee Teck Seng and in Eu Boon Yeap & Ors*). The propounder of the will still had the ultimate burden of dispelling any suspicious circumstances that may have surrounded the making of the will;

(i) the elements or ingredients to be established on evidence to successfully uphold the consideration of 'natural love and affection' as valid, included evidence of some spontaneous happening in the normal course of a relationship predicated by birth (natural) or a fondness or affection of mind (love) together with a measure of personal attachment or feeling for the other;

(j) a duly executed MOT could still be invalidated and any transfer thereby registered could be set aside under s 340(2)(b) of the National Land Code 1965 as having been obtained through a 'void or insufficient instrument', where it can on facts be shown that there was not exuberated any 'natural love and affection' as between the transferor and the transferee;

(k) the jurisdiction of the court to grant relief on an allegation that there was indeed 'undue influence' exerted, is as wide and as flexible as the exigency of the case demand. The court could hold that there was undue influence even without direct proof of any dominance over the will of a party to a transaction, as was judiciously postulated by Jeffrey Tan J (as he then was) in *Khaw Cheng Bok* in the following extract:

> … Where one party in a transaction is in a position to exert undue influence or 'dominion' over the other and takes any benefit from him, *the burden of proving good faith of the transaction is thrown upon the dominant party* … the law presumes everything against the transaction and *the onus is cast upon the person holding the position of confidence or trust to show that the transaction is perfectly fair and reasonable, that no advantage has been taken of his position* …

(l) even where undue influence' may not have been definitely established on evidence, the court could still strike down a will or instrument that had been challenged on that count, under the inherent duty of the court to be vigilant against suspicious circumstances which could go to the root of the validity of any document before the court. This was noted by Jeffrey Tan J (as he then was) in *Khaw Cheng Bok* (at p 579 after quoting several English decisions) in the following terms:

> Nevertheless in many cases in which the court has not been satisfied that there was undue influence, *and even in cases where undue influence has been positively disproved, the court has pronounced against the will propounded because the circumstances have excited its suspicious and vigilance*, and it (the court) has not been satisfied as to the righteousness of the transaction.

EVIDENCE

Witnesses

[16] Both the plaintiffs testified.

The plaintiffs also called four other witnesses, all of whom were medical doctors who attended to the deceased at the Penang Adventist Hospital when the deceased was admitted there between *9 August 2004 and 25 August 2004* (17 days) for medical attention.

PW1, Dr Loo Yook Chon was a consultant physician and the primary care doctor of the deceased at the hospital. *PW2*, Dr PE Samuel Easaw was a consultant neurologist and *PW3*, Dr Prem Kumar Chandrasekaran the consultant neuropsychiatrist,

The deceased after his first period of hospitalisation (9 August 2004–25 August 2004) had visited PW3 (consultant neuropsychiatrist) on several occasions for follow-up consultation up to 6 October 2004.

According to the medical records of these witnesses the deceased was readmitted to the same hospital on 24 December 2004 and he was diagnosed with gastronomic cancer with gastric outlet obstruction (*signet ring adenocarcinoma of stomach, at least stage III*). The deceased was operated on 27 January 2005 but his condition worsened and he passed away on 5 February 2005.

PW4, Dr Balavendran Anthony (a specialist in palliative medicine) however did not personally attend to the deceased at any time and submitted essentially a report which was a 'review' of the medical reports submitted by PW1, PW2 and PW3. In that respects PW4's evidence was only relevant to a limited extent as to the state of health of the deceased.

[17] The defendant called Mr Lee Kheng Hong ('DW1') the advocate and solicitor whose testimony was that he prepared the deceased's will and had read the contents to the deceased. He was one of the two witnesses to the affixing of the deceased's thumbprint to the deceased will on 2 August 2004.

DW1 also testified that he attested to the affixing of the deceased's thumbprint to the MOT which was done on the same day, namely 2 August 2004.

The defendant and his mother ('DW3') were the other witnesses for the defence case.

ASSESSMENT/EVALUATION OF EVIDENCE

[18] The key questions for determination in this proceeding were:

(a) what was the deceased's state of mind (testamentary mental capacity) on 2 August 2004; and

(b) whether there were suspicious circumstances in the making of the will and/or the execution of the MOT by the deceased on 2 August 2004, and if there were such circumstances, whether they had been dispelled.

The state of the deceased mind on 2 August 2004, that is, the point of time when the will was made and/or MOT executed

[19] In my assessment only the evidence of the disinterested witnesses namely, PW1, PW2, PW3 and of DW1 were material to answering this question.

It was true that PW1, PW2 and PW3 did not examine the deceased on 2 August 2004. These medical witnesses had however examined the deceased between the 9 August 2004 and 11 August 2004, just about a week after the 2 August 2004. Their testimony as to specially the mental state of the deceased when they examined him, their diagnosis of the particular medical condition of the deceased and the extent and nature of the illness suffered by the deceased, was in my view, very pertinent and relevant to the issue at hand, notwithstanding the fact that these specialists had not seen or examined the deceased on 2 August 2004.

I could not agree with the submission of counsel for the defendant that such evidence should not be considered at all as it did not advert to the state of mind or capacity of the deceased on 2 August 2004. While it is true that in *Lee Ing*

Chin @ Lee Teck Seng & Ors , the Court of Appeal per Gopal Sri Ram JCA had occasion to note 'The relevant and material point of time at which the mental capacity of the deceased falls to be determined *is the time at which the will was made and not at some earlier or later point*', I do not consider this as barring the court absolutely from entertaining or considering evidence, medical or otherwise, which would enable the court to have a complete picture of the state of mind of an individual whose act, so important as the making of a will, was being challenged for being made without sufficient mental capacity. There is no justifiable ground in the larger interest of justice for such evidence, if it is sufficiently proximate in time (before or after), or is in respect of an illness whose onset might not be immediate and sudden, to be excluded merely because the medical examination was not carried out on the same day the act was allegedly done.

One could have been suffering from a lingering or malignant and progressively aggravating illness which definitely could have had effect on the mental state or the free and unaffected expression of one's will and evidence in this respect cannot be ruled to be irrelevant and barred from consideration by the court.

[20] Materially therefore from the evidence in court, the following need to be highlighted:

(a) PW1 had noted that upon admission on 9 August 2004, deceased was restless and confused mentally.

(b) PW2's upon examination of the deceased on 11 August 2004 found that the cognitive faculties of the deceased was impaired, the deceased had inability to speak fluently, to bring out words in sentences to express himself fully (expressive dysphasia). His blood test showed a *strongly* positive VDRL reading.
The deceased was diagnosed to have meningovascular Syphilis (Neurosyphilis). Although he responded to treatment — there was still some irrational speech.

(c) PW3 (consultant neuropsychiatrist) had examined the deceased on 10 August 2004 and had noted in his report ('P3') that the deceased 'was perplexed, had conduction aphasia, visual agnosia, incoherent but able to obey commands and seemed to be delirious'.
The deceased's high VDRL titre pointed towards 'Chronic Organic Brain Syndrome' and in his testimony PW3 further stated that the neurosyphilis that the deceased was afflicted with had attacked the deceased's brain and nervous system and that was the cause of the 'delirium' suffered by the deceased. PW3 also testified that the deceased had to be restrained in the ward some times. The deceased suffered from what was termed as 'sun downing syndrome' which made the deceased fearful and have delusions between the 3pm and 8pm usually. This was related to *brain damage* — caused by syphilis. PW3 from his notes also

testified that the nephew of the deceased (the defendant) had related to PW3 an episode where the deceased had told the nephew — that the deceased had read somewhere that the deceased had died or that the deceased had killed himself.

This witness — PW3 — also testified that the high VDRL titre would indicate 'chronic' *meaning suffering for some time* — although the witness could not put a time frame within when the deceased would have contracted syphilis.

However for the VDRL levels (titre) to be so high, the deceased's affliction should have been there for some time, he testified.

(d) PW4's review and evidence in my assessment, if at all relevant, was only to the effect that the terminology 'chronic' in a diagnosis indicated a 'progressive' condition and in this case an ongoing brain damage caused by nuerosyphilis as diagnosed by PW2 and PW3.

[21] On the other hand, DW1 — the advocate and solicitor who prepared the will for the deceased on 2 August 2004 and who was one of the witnesses to the will testified that the contents of the will was read and explained by him to the deceased and the deceased *seemed* thoroughly to understand the same. Upon being cross-examined *DW1 could not remember how much time the deceased was in his (DW1's) office and neither whether the deceased did speak much or hardly at all.*

The taking of instructions and execution of the will by the deceased, seemed to me as highlighted by counsel for plaintiff, to have been hurriedly done as well, since certain corrections made necessary by spelling errors of the deceased's name was done merely by deletion and a type-over rather than a fresh copy being produced (by word processing/computer which would have been more expedient) or which should have been availed of in the circumstances; the original copy was a computer printout in any case.

[22] I have some difficulty in uncritically accepting DW1 evidence — as an independent witness (as opposed to the defendant) as to the mental state of the deceased on 2 August 2004 when the will is purported to have been made before him. DW1 to me did not impress me as a forthright witness. He displayed selective memory and was evasive on crucial questions put to him.

It would have been of assistance to the court if the other witness to the will (Cheah Chin Im) had also been called by the defence to be examined on this crucial fact towards ascertaining the mental capacity of the deceased at the time of making the will (or for that matter to dispel the other suspicious circumstances surrounding the making of the will or the execution of the MOT as will emerge shortly).

[23] In the absence of any satisfactory proof by the defendant that the deceased had full and unimpaired mental capacity on 2 August 2004, (save DW1's testimony which was ambivalent, as I have noted above), I was more persuaded to hold that the medical reports and the testimony of the three medical consultants who attended to the deceased albeit, on or about the 9 August 2004 to 11 August 2004, that the deceased suffered from 'Chronic Organic Brain Syndrome' caused by meningovascular syphilis (neurosyphilis), tilted more towards the fact that the deceased, on a balance of probabilities, would have been suffering from those conditions namely, confusion, delusion and cognitive impairment, for some time even prior to the deceased's said treatment and hospitalisation at Penang Adventist Hospital from 9 August 2004 to 25 August 2004.

The medical condition of the deceased detected some one week later was of an illness of such severity and of a chronic nature that in all probability, that condition was prevalent and had impaired the deceased mental faculty even on 2 August 2004.

This was a finding of fact that I had come to on the evidence before me.

[24] As noted from the principles of law above, the burden was on the defendant as propounder of the will to establish on cogent and acceptable evidence that the testator (deceased in this case) had full and sufficient testamentary capacity when making the will. DW1 merely stating in testimony that the contents of the will had been read over and the testator 'seemed' to understand the same, was not sufficient to discharge that onus, particularly in the light of consistent evidence of three medical witnesses that the mental condition of the deceased as diagnosed on 9 August 2010 was neurosyphilis which had affected the brain and nerves of the deceased. PW3's testimony was that this was a 'chronic' condition — in that it was not an 'acute' or of sudden onset but could have progressed to that state over time.

The defence failed to call any evidence to dispute the seriousness of the deceased's affliction as stated in the medical reports of PW1, PW2 and PW3 and its implication or impact on the mental capacity or condition of the deceased pre-9 August 2008. The defence chose to rely purely on DW1's testimony (see counsel for the defendant's closing oral submissions). The defence should have challenged the diagnosis of the consultants PW1, PW2 and PW3 that the deceased suffered from a chronic disease that affected the brain but failed to call any independent medical evidence to show that the condition of deceased detected a week later would have had no bearing on the state of the deceased's mind on 2 August 2004.

The suspicious circumstances surrounding the due execution of the deceased's will and/or the MOT and whether such doubts surrounding the same had been dispelled by the defendant, on whom the burden lay to do so

[25] Those suspicious circumstances and questions surrounding the context of the making of the will and/or the execution of the MOT or in respect of the plaintiff's allegation of 'undue influence' or 'dominion' by the defendant over the will of the deceased, as have emerged from the evidence before me, could be enumerated as follows:

(a) Why was it necessary to have both a will and/or MOT in respect of the most valuable asset of the deceased (the 1/2 undivided shares in Lot 763) at the same time? Would not, the deceased's will have been sufficient to meet the deceased's intention effectively, if that was the case?
DW1 stated this was done on the 'instruction' of the deceased, persumably, according to DW1, to double safeguard the deceased's intention;

(b) Why was the 'thumbprint of the deceased affixed to the will and the MOT, when the deceased was shown to be able to sign his name in English characters (P7, p 22 CABD — *jilid* 1)? Was it because the deceased was too ill or not in a proper mental condition to sign his name in full?
DW1's testimony was that the deceased asked to execute the documents by affixing of the 'thumbprint'. I am of the view that DW1 should have enquired whether deceased could execute by way of a signature rather than merely allowing the affixing on thumbprint;

(c) The thumbprint of the deceased on both the will and MOT were placed 'sideways' not in the upright manner as is usually done.

(d) In respect of the instructions for and the preparation of the will and the MOT, it was DW1's evidence that he took instruction and prepared the will at the firm of Messrs Tan Chia Meng, where he was still a partner on 2 August 2004. As noted above, DW1 was evasive ('could not remember') as to the level of conversation he had with the deceased. The will, as also noted above, appear to have been 'hurriedly' completed for the thumbprint of the deceased to be affixed.

(e) As regard the MOT, DW1 admitted that this instrument was prepared at another firm of solicitors and the execution was originally intended to be attested by one Phee Boon Leong, an advocate and solicitor with that firm. DW1 also stated he had intended to join Phee Boon Leong as a partner in September 2004. The MOT, it was testified was brought over to DW1's firm to be executed by the deceased and be attested by DW1 at the same time of the making of the will. Why was no fresh MOT prepared in the circumstances at DW1's firm (on 2 August 2004) but the

earlier one prepared for attestation by Phee Boon Leong retained and the 'attestors' name changed by mere deletion and substitution? A

(f) It was *DW1 evidence* that the *defendant paid the 'legal fees'* for the preparation of the will and execution of the MOT. The *defendant however in evidence, given subsequently,denied this most vehemently.* DW1 positively asserted that the legal fees were paid to Messrs Tan Chia Ming and receipts issued to the defendant. B
This contradictory evidence as between DW1 and the defendant was left open and the defence failed to adduce any evidence to show what indeed was the true situation in that respects. Further evidence by way of clarification was certainly within the power of the defence to call to allay whatever doubts that had emerged. The defendant by his denial appeared to want to explicate himself from his role in the making of the will or the execution of the MOT by the deceased before DW1; C

(g) There were alterations or correction obvious on the body of the will which had not been countersigned by the deceased (or, rather by deceased's further thumbprints). It is normal in legal practice to have any corrections or amendments to important documents, like a will to be initialed by relevant parties involved (I do not think it is necessary to make any ruling as to applicability of s 15 of the Wills Act 1959 in the circumstances as what is being highlighted is the suspicious features surrounding the making of the will; the grounds relied on by the plaintiffs to invalidate the will are more substantive in nature than this limited procedural point in any event). D E F

(h) DW1 upon being cross-examined stated that he 'could not remember' whether the defendant was present personally at DW1's office when the affixing of the thumbprints to the will and the MOT took place on 2 August 2004. The defendant strenuously denied that he was present at DW1 office. G
The *defendant however admitted that he drove the deceased* to the building where DW1's office was situated on the day the will was made/MOT executed. Upon being questioned how the defendant's identity card number could be available for insertion in the will and MOT, the defendant's explanation was that the deceased had requested for it and he had given him the said identity card number. H

(i) The other possible disinterested witness to the events of the 2 August 2004 was the second witness to the deceased's will. But this witness was not called to give evidence to put at rest the many doubts surrounding the affixing of the thumbprint and the contradictory testimony between that of DW1 and the defendant. I

(j) Coming then to the MOT, DW1's evidence was that the deceased (as transferor) executed it before him on *2 August 2004*. It was also DW1's

A evidence that the transferee, *the defendant, however only executed the MOT* before him some *four months later on 22 December 2004* as dated on the MOT. As would be noted, this followed a similar pattern, that is after the name of Phee Boon Leong, the originally intended attestor's name was deleted and substituted with DW1's name. DW1 was already a partner in the same firm as Phee Boon Leong in December 2004.

B This execution by the defendant appeared to coincide with the second admission of the deceased in hospital in December 2004 from which the deceased never recovered and finally succumbed to his illness.

C The MOT was only presented for adjudication of stamp duty payable on 19 January 2005, stamped on 28 March 2005 and presented for registration on 25 April 2005. The deceased had passed away on 5 March 2005.

D The defendant's explanation for this rather convoluted and delayed action on the MOT claimed to have been executed by deceased on 2 August 2004, was that the defendant did not have the funds for purposes of stamping and that he was compelled to charge the 1/2 undivided share to raise funds to settle stamp duty as well as medical and funeral expenses of the deceased.

E (k) There was no evidence that the defendant had some definite income or means of living. In fact the evidence was that the defendant rented a room from a friend and it was there that the deceased was housed with him (the defendant) between the time of the deceased's discharge from hospital on 25 August 2004 and deceased subsequent admission to hospital in

F December 2004.

It cannot escape attention that the plaintiffs (PW5 and PW6) testified that the deceased had been kept away, incommunicado from them, as well as from the normal place of residence of the deceased in Kulim during that period between August 2004 to December 2004 by the

G defendant.

(l) Simultaneously with the subsequent registration of transfer of the deceased's 1/2 share in Lot 763 on 25 April 2005,(ie after the deceased's death) to the defendant's name, the defendant's interest in the property

H was charged to a finance company for a declared loan of RM200,000. However this loan was not serviced promptly and upon being foreclosed by the finance company, the total amount owing to the finance company, admittedly had increased to an amount in excess of RM900,000.

The defendant was vague about how the debt had snowballed to such a

I large sum.

This raised genuine and valid suspicion as to whether all these moves were manipulated and arranged by the defendant for his benefit, although he denied the same.

(m) the *prior relationship or contacts between DW1 and the defendant* came into

focus in the cross-examination of DW1. DW1 admitted that he knew defendant previously and the Defendant had visited DW1 in his office before. DW1 was evasive, in my assessment, as to why and the nature of their relationship or grounds of the prior contacts. A reasonable inference was that the deceased (who had lived in Kulim all this while) was introduced to DW1 by the defendant; and

(n) it was also admitted by that the defendant that prior to 8 August 2004, the deceased had lived all by himself in Kulim (as confirmed by PW5, PW6 and even DW3) and the deceased only lived with defendant between the August (after the first hospitalisation) and December 2004 (when deceased was readmitted). Circumstances to the existence of 'natural love and affection' before 2 August 2004 (date of execution will and MOT) between the deceased and the defendant were therefore wholly absent and, if at all there were any such circumstances, it was seriously suspect.

[26] Viewing the suspicious circumstances surrounding the making of the will and/or the execution of the MOT as enumerated above as a whole, there were many unexplained doubts surrounding the matter. More significantly there also arose from the facts, in my mind, a perfectly possible scenario that the will and/or the MOT was *not* executed indeed by the deceased on 2 August 2004 as date marked, but only made/executed sometime after the medical condition of the deceased was obviously untenable, possibly in or after September 2004 (after DW1 had joined Mr Phee Boon Leong as a partner), and the making/execution then backdated to 2 August 2004 by arrangement between DW1 and the defendant, to give it the colour of regularity.

[27] I have given due consideration to the evidence in its entirety laid before this court for the plaintiffs and for the defendants respectively, and it is my finding and conclusion that the defence has failed to discharge the burden on them to allay all doubts and dispel the suspicious circumstances surrounding the making of the deceased will and/or execution of MOT claimed to be on 2 August 2004.

[28] Similarly the defendant had failed to displace the plaintiff's case that the defendant had exerted 'undue influence' or 'dominion' over the will and mind of the deceased by any credible independent evidence. The defendant admitted that he took the deceased to the lawyer's office by the defendant to make/execute the instruments being challenged, gave the defendant's identity card number and going by the words of a lawyer, the defendant even paid for all legal charges related to the making/execution of the will or MOT. The circumstances were not only suspicious but it pointed to one irresistible conclusion in my mind that the defendant had orchestrated the whole episode to lay his hands on the deceased's assets.

For completeness I must also state that these suspicious circumstances, in my assessment, were not mere conjectures or surmises by the plaintiffs but were inference of facts that could be drawn and concluded from facts that had been established on evidence before me.

CONCLUSION

[29] I was conscious that in assessing the evidence led before the court, I should not confuse the *circumstances surrounding the testamentary capacity of the deceased* on 2 August 2004 with those related to the *suspicious circumstances surrounding the making of the will and/or execution of the MOT.* I had therefore dealt with them separately and as distinct heads as set out above in this grounds of decision.

The plaintiffs had raised serious issues as to the testamentary capacity, specifically the mental state of the deceased on 2 August 2004 when the impugned will and/or the MOT was claimed to have been made/executed. The defendant had failed to discharge the burden on him to establish on evidence that the deceased was possessed of full testamentary capacity to make the will or had executed the MOT by deceased freely and in a stable mental state on 2 August 2004.

The defendant had also failed on satisfactory evidence to allay the doubts arising from or to dispel the suspicious circumstances surrounding the making of the will and/or execution of the MOT, as was by incumbent upon the defendant to do as required by the time honoured authorities and principles of law applicable in this area of law.

[30] It was also my conclusion that it did not matter that the cause of testamentary incapacity or the affliction suffered by the deceased at the time of the making of the will and execution of the MOT, was named or *pleaded to be 'cancer'* (or 'carcinoma') *but* the evidence of the PW1, PW2 and PW3 was something else — namely 'Chronic Organic Brain Syndrome' caused by meningovascular syphilis (or neurosyphilis). The basic question before this court was whether the deceased had the necessary mental capacity to make the will and divest his property as he purportedly was claimed to have done and whether it was done freely in accordance with the deceased's own conscious will, devoid of any undue influence or pressure from others.

[31] I also hold that the pleadings filed by the plaintiffs did set out sufficient and definite particulars as to the case that the defence had to meet in this challenge as to the validity of the will and the MOT. The defendant's contention that no particulars were pleaded on this score was without merit.

[32] The defendant raised the issue of proceedings under reference of

OS-24–1733–2055 between the same parties but this proceedings was in respect of the caveat entered by or for the plaintiffs against the deceased's 1/2 undivided shares in Lot 763 and its preservation or consequential orders related to that matter. Those proceedings in that context had no bearing to the action at hand here which was the substantive action to determine the validity of the will and/or the MOT under which the defendant had proceeded to obtain the grant of probate to the deceased's estate to be issued to the defendant and/or the transfer of the 1/2 undivided shares in Lot 763 into the defendant's name.

[33] Harping on those proceedings, Originating Summons 24–1733–2055, or maintaining that the grant of probate had since been issued to the defendant and/or that the defendant's 1/2 undivided share in Lot 763 was now indeafeasible having been successfully registered under the NLC into the defendant's name, was to me a totally misconceived approach showing a misapprehension by the defence of the significant issues that was up for determination, in these suits by the plaintiffs. The defendant should have adduced evidence to effectively meet the plaintiffs' challenge and not merely rely on the testimony of DW1.

[34] This court takes note that the 1/2 undivided shares in Lot 763 transferred to the defendant and charged by defendant in turn to a finance company has since institution of this proceeding, been auctioned off pursuant to an order for sale obtained by the finance company in a foreclosure proceeding. The excess of proceeds after settling the amount owed by the defendant to the finance company has since been ordered to be retained in court pending further orders to be made in that separate proceeding.

[35] In the upshot, it was my conclusion and finding that the plaintiffs had succeeded in their case against the defendant to invalidate both the deceased's will made on 2 August 2004, and also, for whatever cause it may still be relevant, to also invalidate the MOT executed by the deceased in respect of the gift of the deceased 1/2 undivided share in Lot 763 purportedly in favour of the defendant.

It followed therefore that the plaintiffs were entitled to the following declaration and orders which I proceeded to make:

(a) It is declared that the document dated 2 August 2004 and claimed to be the last will and testament of Choo Peng Hoi @ Choo Peng Jen (deceased) is invalid and of no effect in law.

(b) It is declared that the grant of probate issued on 2 August 2005 to the defendant under proceedings Mahkamah Tinggi Pulau Pinang, Petisyen No 32–168 of 2005 in respect of the estate of the Choo Peng Hoi @ Choo Peng Jen (deceased) be and is hereby recalled and revoked and to

this end the defendant is directed to forthwith surrender the sealed copy the grant of probate issued to the defendant to the court.

(c) It is declared that the said Choo Peng Hoi @ Choo Peng Jen (deceased) died intestate on 5 February 2005.

(d) It is declared that the MOT (*Borang* 14A) claimed to have been executed by Choo Peng Hoi @ Choo Peng Jen (deceased) as transferor on 2 August 2004 for purposes of transferring to the defendant, the 1/2 undivided share in Lot No 763, Mukim Padang China, Daerah Kulim, Negeri Kedah for the consideration of 'love and affection', is a void instrument.

(e) It is declared that the transfer of the 1/2 undivided share in Lot No 763, Mukim Padang China, Daerah Kulim, Negeri Kedah registered on 5 April 2005 in favour of the defendant is invalid and of no effect in law and the said 1/2 undivided share in Lot No 763 remained an asset in the estate of Choo Peng Hoi @ Choo Peng Jen (deceased) at all times.

(f) It is ordered that the defendant pay damages to the estate of Choo Peng Hoi @ Choo Peng Jen (deceased) for all losses caused by or arising from the wrongful transfer of the 1/2 undivided shares in Lot No 763, Mukim Padang China, Daerah Kulim, Negeri Kedah to the defendant and the senior assistant registrar is directed to assess all such damages payable by the defendant.

(g) It is ordered that the defendant render full accounts in respect of the affairs and matters related to the estate of Choo Peng Hoi @ Choo Peng Jen (deceased) conducted by the defendant purportedly under or pursuant to the grant of probate issued to the defendant on 2 May 2005 (which grant of probate has now been revoked) and such accounts and all remaining assets and funds belonging to the estate of Choo Peng Hoi @ Choo Peng Jen (deceased) be turned over to the administrators of the estate of Choo Peng Hoi @ Choo Peng Jen (deceased) within fourteen days of demand for the same by the said administrators after such administrators of the estate of Choo Peng Hoi @ Choo Peng Jen (deceased) has been appointed by court.

(h) It is ordered that the defendant pay damages to the estate of Choo Peng Hoi @ Choo Peng Jen (deceased) for all losses caused to or suffered by the said estate and such damages are directed to be assessed by the senior assistant registrar of this court.

(i) It is ordered that the defendant pay interest on such damages assessed and payable by the defendant to the estate of Choo Peng Hoi @ Choo Pen Jen (deceased) pursuant to the Orders 6 and 8 made by this court as aforesaid, at the rate of 4%pa from the date of this judgment until full payment.

(j) It is ordered that both or either of the plaintiffs be at liberty to apply for letters of administration to be issued to either or both of them in respect of the estate of Choo Peng Hoi @ Choo Peng Jen (deceased).

(k) It is ordered that the defendant pay the plaintiffs costs of this action which is now fixed in the gross sum of RM30,000.

Plaintiffs' claim allowed with costs.

Reported by Kohila Nesan